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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

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Constitutions

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(Above Government Codes are found in Deering's California Codes Annotated, §§15,250-22,999 (1958).)

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STATE COMPENSATION INSURANCE FUND,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioner prays that a writ of certiorari issue to review the decree of the Supreme Court of the State of California entered in the above case on June 30, 1965.

OPINIONS BELOW

The Municipal Court, the Appellate Division of the Superior Court, the District Court of Appeal, and

the Supreme Court of the State of California delivered no opinions.

JURISDICTION

The order of the Supreme Court of the State of California "hearing denied", without opinion, was made and entered on June 30, 1965 and a copy thereof is appended to this petition in the Appendix at page ix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Petitioner, 49, pleaded in propria persona in his complaint, filed in the Municipal Court in San Francisco, California on July 29, 1964 that the respondent State Compensation Insurance Fund, his employer from April, 1957 to January, 1961, had refused to promote him because of his age and that the respondent State Personnel Board had demoted him in rank on an employment list without explanation. He alleged damages. The State Compensation Insurance Fund demurred that the court had no jurisdiction over the subject of this action, alleging that petitioner had failed to exhaust his administrative remedies and that the statute of limitations had barred his cause of action. The court sustained the demurrer and, since petitioner's attorney had failed to amend the complaint, entered a judgment of dismissal with prejudice on motion of the respondent State Compensation Insurance Fund; no opinion was delivered.

In his notice of appeal and briefs with the Appellate Division of the Superior Court, petitioner, in propria persona, refuted the arguments of the respondent and pleaded that he was denied the equal protection of the laws and deprived of property, namely, the difference between his salary and the higher salaries of the positions for which he had been found qualified, without due process of law in violation of the Fourteenth and Fifth Amendments of the Constitution of the United States and California Government Codes; he pleaded furthermore that the statement by the General Manager of the State Compensation Insurance Fund to the Governor "that it is not in the Fund's best interest to offer 'him' reassignment or promotion" was supported by no grounds and hurt his good name.

The respondent State Compensation Insurance Fund pleaded in its answering brief as in its demurrer and that the judgment of dismissal with prejudice was proper. The Appellate Division of the Superior Court affirmed the judgment, deciding "that there is no error in the record prejudicial to the appellant" without opinion.

The applications of petitioner for rehearing or in the alternative for certification to the District Court of Appeal upon the cited Constitutional and further grounds were denied without opinion.

In his petition for a writ of certiorari with the District Court of Appeal petitioner pleaded on the Constitutional and other grounds stated in the court

below. "The petition for a writ of certiorari 'was' denied" without opinion.

In his petition for a hearing with the Supreme Court of the State of California petitioner pleaded that the decision of the court below denied his rights and damages under the Fourteenth and Fifth Amendments of the Constitution of the United States, federal courts, and state regulations. The respondent State Compensation Insurance Fund wrote that "defendants will not file an Answer . . . because . . . petitioner exhausted all available remedies" after decisions by the Appellate Division of the Superior Court. On June 30, 1965 the Supreme Court denied his petition for a hearing without opinion.

1. Whether the respondent State Compensation Insurance Fund by refusing to appoint petitioner because of his age in violation of State Government Codes prohibiting such age discrimination denied him the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

2. Whether the respondent State Compensation Insurance Fund by refusing to appoint petitioner and the State Personnel Board by demoting him in rank on an employment list without grounds deprived him of property, namely the difference between his salary as Intermediate Clerk and the higher salaries of the positions for which he had been found qualified, without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Whether the statute of limitations of six years of the United States applies to the cause of petitioner.

4. Whether the respondent State Compensation Insurance Fund by informing the Governor "that it is not in the Fund's best interest to offer 'petitioner' reassignment or promotion" without hearing or filing of charges denied him due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, acted maliciously, oppressively, and arbitrarily, and hurt the good name of petitioner.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND CODES INVOLVED

The pertinent portions of the Fifth and Fourteenth Amendments to the Constitution of the United States; of Article I, Sections 3 and 10 and of Article V, Sections 7 and 21, and of Article XXIV, Section 1 and 6(a) of the Constitution of the State of California; California Government Code Sections 18901(b), 18932, 18951, 18952, 19050, 19058, 19680(c), 19681(c), 19700 and California Labor Code Sections 1050, 1052, and 1054 are set forth in the Appendix at pages i to vii.

STATEMENT

Petitioner, 49, is a layman who could not find an attorney willing to file a complaint in his cause even though he had paid the fees of two attorneys. He

pleaded in his complaint, filed on July 29, 1964 in the Municipal Court in San Francisco, in propria persona that during his employment with the respondent State Compensation Insurance Fund from April, 1957 to January, 1961 he had passed examinations for higher positions with his employer; that his superiors instead of promoting him coerced him to waive rights for promotion, refused to appoint him because of his age, appointed people Accounting Technician II whose names were on no civil service list for this class when his name was on two Accounting Technician II lists, and that the respondent State Personnel Board had denied his grievances in these matters; that qualification appraisal panels received instructions from his employer which caused them to disqualify petitioner, that a transcript of an interview for a higher position contained statements which he had not made, and that the State Personnel Board demoted him in rank from 2 to 4 on an Accounting Technician II list for Fresno. He alleged damages in the amount of $2,150. (Record, Municipal Court, complaint, pages 1-5.)

The respondent State Compensation Insurance Fund demurred that the complaint did not state facts sufficient to constitute a cause of action, that the court had no jurisdiction because petitioner had failed to exhaust his administrative remedies, and that his cause appeared to be barred by the statute of limitations. (Record, Municipal Court, demurrer, pages 1-3; memorandum, pages 1-7.)

An attorney accepted the case of petitioner. Demurrer was sustained in the hearing with 20 days

given to his attorney in which to amend the complaint; his attorney was given another extension of time, but he filed no amendment. Petitioner informed the court on October 26, 1964 that he had filed a complaint against his attorney for the return of his litigation papers, that his attorney no longer had power of attorney, and that he would amend his complaint as soon as he had received his papers. On November 20, 1964 petitioner discovered that a judgment of dismissal with prejudice had been entered against him on November 12, 1964 on motion of the respondent State Compensation Insurance Fund. In moving for this judgment the respondent had cited *Oppenheimer v. Deutchman,* 1955, 132 CA 2d Supp. 875, 281 P. 2d 650 and stated: "In the cited case, the action was dismissed with prejudice on ex parte motion of Defendant." (Record, Municipal Court, memorandum of points and authorities (Dismissal of Complaint), page 1, line 26 to page 2, line 3.) Since his letter of October 26, 1964 to the court had not been filed, petitioner informed the court and the parties on November 23, 1965 that his attorney no longer had power to represent him.

Petitioner filed immediately a notice of appeal on November 23, 1964, in which he specifically claimed violations of his rights under two provisions of the Fourteenth Amendment to the Constitution as follows:

> ". . . he is the only layman in the annals of jurisprudence who could not find an attorney willing to protect his rights under the laws and the Constitution of the State of California and under the Constitution of the United States in

court and who never received a fair hearing by the State of California concerning his grievances, explained in his complaint, which means that he was denied the equal protection of the laws and deprived of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. Wherefore the plaintiff prays that the Superior Court may annul the Judgment of Dismissal, transfer the complaint to the Superior Court, . . . protect the rights of the plaintiff under the laws and the Constitution of the State of California and under the Constitution of the United States, . . ." (Record, Municipal Court, notice of appeal, page 4, lines 13-31.)

Petitioner pleaded in his opening brief, filed on January 5, 1965 with the Appellate Division of the Superior Court, that the court below gave no grounds for entering a judgment of dismissal *with prejudice* even though in the cited case of *Oppenheimer v. Deutchman* the reviewing court had stated three times that the judgment of the court below should *not* be *"with prejudice"* and that the case of *Oppenheimer v. Deutchman* and his case are not comparable. (Record, Superior Court, opening brief, page 2, line 17 to page 4, line 9.)

In answering the arguments of the respondent State Compensation Insurance Fund in its demurrer for dismissing his complaint, petitioner explained that that he had filed his grievances with the respondent State Personnel Board on basis of Government Code 18952 and that he had exhausted his administrative

remedies when the State Personnel Board had informed him of its determinations. (Record, Superior Court, opening brief, page 4, line 10 to page 5, line 14.) He explained that Government Code 18714 and Rules 63, 64, 69, 202 and 203.5 of the State Personnel Board, Title 2, Division 1, set out verbatim by the respondent State Compensation Insurance Fund in the memorandum of points and authorities in its demurrer, do not apply to his cause; (Record, Superior Court, opening brief, page 6, lines 9-32) and likewise Government Code 19630 (Record, Superior Court, opening brief, page 12, lines 11-16). He explained that his case and the cases which the respondent had cited in the above memorandum in support of its assertions that the complaint does not state facts sufficient to constitute a cause of action or that his cause is barred by the statute of limitations are not comparable. (Record, Superior Court, opening brief, page 13, line 18 to page 14, line 26.)

In answering the assertion of the respondent State Compensation Insurance Fund on page 1, lines 31 and 32 of its demurrer that "the complaint in each alleged cause of action does not state facts sufficient to constitute a cause of action", petitioner claimed specifically violations of his rights under two provisions of the Fourteenth Amendment to the Constitution of the United States as follows:

> "The plaintiff claims damages in the amount of $2,150, which is the difference between the amount the plaintiff earned as Intermediate Clerk in the canceled policies' file room of the State Compen-

sation Insurance Fund and the amount he would have earned if he would have been promoted Compensation Insurance Technician, Accounting Technician II and then Compensation Insurance Assistant, and alleges that during his employment with the defendant State Compensation Insurance Fund his rights under Government Codes 18932, 19700, 18951, 19050, 19058, 18901(b), 19680(c), and 19681(c) were violated, and that he was denied the equal protection of the laws and deprived of property, $2,150, without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, as explained in the following." (Record, Superior Court, opening brief, page 7, lines 4-17.)

Petitioner pleaded that the respondent State Compensation Insurance Fund violated Government Code 19680(c) by giving instructions to qualification appraisal panels not to let petitioner pass interviews because of his age; that officials of the respondent violated Government Code 19681(c) by coercing him to waive employment rights for the position of Compensation Insurance Technician; that the respondent violated Government Codes 19050, 19058 and 18901(b) by appointing people Accounting Technician II whose names were on no civil service list for this class when the name of petitioner was on two Accounting Technician II civil service lists; that his demotion in rank from 2 to 4 without grounds on the Accounting Technician II list for Fresno by the respondent State Personnel Board appeared to be in disregard of Article XXIV, Section 1 of the Constitution of the State of

California. (Record, Superior Court, opening brief, page 7, line 18 to page 8, line 9.)

Petitioner explained his futile efforts to obtain redress of his grievances by petitioning the Governor, the Attorney General and several members of the State Legislature. (Record, Superior Court, opening brief, page 5, lines 15-28; page 8, line 10 to page 11, line 7.)

Petitioner specifically claimed violation of his rights under the Fourteenth Amendment to the Constitution of the United States as follows:

> "The Fourteenth Amendment of the Constitution of the United States provides that 'no state shall deny to any person within its jurisdiction the equal protection of the laws.' After the plaintiff had passed written examinations for the Compensation Insurance Assistant class, he was in the same class with all the persons who had passed this examination. The Superintendent, however, appointed people younger than the plaintiff who had passed the test as the plaintiff had, and he refused to appoint the plaintiff because of his 'twenty more years on 'his' back'. The plaintiff pleads that the refusal by the Superintendent to appoint him amounted to a denial of his Constitutional right to the equal protection of the laws. *Yick v. Hopkins,* 118 U. S. 356 (1885)." (Record, Superior Court, opening brief, page 11, lines 8-19.)

Petitioner claimed specifically that the respondent State Compensation Insurance Fund deprived him of property for public use, without compensation and

due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States as follows:

> "The plaintiff explained that during his employment with the State Compensation Insurance Fund as an Intermediate Clerk he had passed written examinations for the Compensation Insurance Assistant class and that he had been found qualified for other higher and better paid positions by qualification appraisal panels. But he was not appointed and had to continue working in the canceled policies' file room of the State Compensation Insurance Fund. He filed many grievances with State agencies in these matters, but no hearing was held. Therefore, he alleges that he was deprived not only of gaining experience in higher positions but also of the higher salaries of these positions when the State Compensation Insurance Fund let him stay in the file room and thus appropriated his services for public use without hearing and paying him the difference between his salary as Intermediate Clerk and the salaries of the higher positions for which he had been found qualified in the total amount of $2,150. *United States v. Lynah,* 188 U. S. 445, 464, 465 (1903.) *United States v. Palmer,* 128 U. S. 262 (affirming Ct. Cl. 1888); *United States v. Berdan Fire Arms Mfg. Co.,* 156 U. S. 552 (affirming Ct. Cl. 1895); *Schwartz v. Board of Bar Examiners,* 353 U. S. 232 (1957) and *Konigsberg v. State Bar,* 353 U. S. 252 (1957), cited in United States District Court for the District of Oregon, Civil No. 61-349, Memorandum of Decision, June 22, 1964." (Record, Superior Court, opening brief, page 11, line 20 to page 12, line 10.)

In a memorandum of points and authorities to his opening brief petitioner had quoted the principles which this Court had established in the above cited decisions; however, the Clerk of the Appellate Division of the Superior Court did not file it since his opening brief had already the maximum number of 15 pages permitted by the Appellate Division for opening briefs. He stated these quotations again in his memorandum of points and authorities to his petition for a writ of certiorari with the District Court of Appeal.

The respondent State Compensation Insurance Fund pleaded in its answering brief that the judgment of dismissal was proper, petitioner failed to amend his complaint and the complaint failed to state a cause of action, that the court had no jurisdiction over the action of petitioner since he had failed to exhaust his administrative remedies, and that the cause of petitioner was barred by statutes of limitations of Government Code 19630 and the 3-year limitation period of CCP 338. (Record, Superior Court, answering brief of respondent State Compensation Insurance Fund, page 2, line 30 to page 3, line 11; page 5, lines 29-32.)

The respondent admitted on page 6, lines 17-19 of its answering brief that "it is true that in the *Oppenheimer* case the court in that particular case stated that the complaint should not have been dismissed 'with prejudice' ".

The respondent quoted in full nearly all the rules and codes which it already had quoted in full in the

memorandum of its demurrer. (Record, Superior Court, respondent's answering brief, page 3, line 18 to page 6, line 11.)

Petitioner pleaded in his answering brief, that it was beyond his control to amend his complaint in the court below, that the judgment of dismissal was not proper, that he had exhausted his administrative remedies before he filed his complaint, and that the cases cited by the respondent in its answering brief and his case are not comparable. (Record, Superior Court, petitioner's answering brief, page 1, line 19 to page 2, line 3; page 2, lines 8-10; page 2, line 12 to page 3, line 2; page 3, line 13 to page 4, line 7; page 6, line 13 to page 7, line 4.)

In order to direct the attention of the Appellate Division to his claim that he raised federal questions timely and properly, petitioner specifically claimed that the respondent State Compensation Insurance Fund violated his rights under two provisions of the Fourteenth Amendment to the Constitution of the United States and by quoting the decision of this Court in *United States v. Lynah* also under the Fifth Amendment to the Constitution of the United States, petitioner specifically claimed that the statute of limitations of six years of the United States applies to his cause as follows:

> "The appellant alleged on page 11, line 8 to page 12, line 10 of his opening brief violations of his rights under the following provisions of the Fourteenth Amendment to the Constitution of the United States: 'Nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Article I, Sec. 3 of the Constitution of the State of California states: 'The State of California is an inseparable part of the Union, and the Constitution of the United States is the supreme law of the land.' . . . In *United States v. Lynah,* 188 U. S. 445, . . . on page 457 the counsel for Mr. Lynah pleads the following: 'The cause of action accrued within six years. . . . *Kendall v. United States,* 107 U. S. 125; . . .' In *Kendall v. United States,* supra, it is stated that 'every claim—except those specifically enumerated—is forever barred unless asserted within six years from the time it first accrued'. 'Therefore, following the settled law of the court, we hold that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefor. The judgment is affirmed. *United States v. Lynah,* 188 U. S. 474.' Therefore, the statute of limitations of six years of the United States applies to the causes of the appellant, and his causes are not barred by the statute of limitations." (Record, Superior Court, petitioner's answering brief, page 4, line 9 to page 5, line 8.)

Petitioner specifically claimed interruption of the statute of limitations on December 2, 1961 as follows:

"On December 2, 1961 the appellant submitted a petition to the Chief Justice of the District Court of the United States in San Francisco, California with the request to have the District act upon his cause, since it involved violations of

his rights under the Fourteenth Amendment of the Constitution of the United States; he explained the grievances stated in his complaint. On December 5, 1961 Mr. Richard S. Goldsmith replied to him at the request of Judge Harris. Mr. Goldsmith returned the petition since it 'did not meet the requirements of federal civil procedure . . .', and he suggested among other things to have an attorney prepare a complaint. But the plaintiff could not find an attorney willing to prepare a complaint. The plaintiff pleads that the statute of limitations was interrupted when he petitioned the court to act upon his petition." (Record, Superior Court, petitioner's answering brief, page 5, line 30 to page 6, line 11.)

Petitioner explained on page 5, lines 15-32 of his opening brief that he had enquired of Governor Brown on December 13, 1960 who had jurisdiction over his grievance concerning discrimination because of age and that a secretary of the Governor informed him on January 17, 1961 that he had exhausted his administrative remedies and that "in your case, I understand that Mr. Earl Howard, General Manager of the State Compensation Insurance Fund, is aware of your situation and concurs in the conclusion of your supervisors in the Fund that it is not in the Fund's best interest to offer you reassignment or promotion . . .". Petitioner pleaded that "the Court, therefore, has jurisdiction in the above-entitled matter. Mr. Howard did not define the best interest or explain why it was not in the best interest of the Fund to promote the plaintiff. The plaintiff alleges that he

therefore was denied due process of law. *In re Porterfield,* 28 C 2d 91; 168 P. 2d 706."

Petitioner pleaded that this statement by Mr. Howard was supported by no reasons, was in contradiction to the good performance reports he had received and that it must be concluded on the basis of the preponderance of evidence which he submitted that the respondent State Compensation Insurance Fund gave similar information about the petitioner to his prospective employers because he was unable to secure steady work from February to June, 1962 after his graduation from college. Petitioner claimed therefore treble damages on the basis of State Labor Codes 1050, 1052, and 1054 in the amount of $5,256.89. He prayed judgment against the defendants in the amount of $100,000 for alleged punitive and general damages. . . . He prayed "for an order enjoining the respondents from giving any information of any kind about the appellant to third parties which might 'hurt his good name or his fair reputation' "; *Times Pub. Co. v. Carlisle,* 94 Fed. 762 (1899). (Record, Superior Court, petitioner's answering brief, page 7, line 6 to page 10, line 32; page 11, line 9 to page 13, line 3; page 13, lines 14-17.)

Petitioner pleaded in the hearing of his appeal on March 12, 1965 as stated in his briefs. The respondents did not dispute any facts which he had claimed and pleaded.

On April 6, 1965 the Appellate Division of the Superior Court decided without opinion "that there is no error in the record prejudical to the appellant",

ordered the judgment in the court below affirmed, and "that the respondent recover the costs of appeal".

In his petition for rehearing or in the alternative for certification to the District Court of Appeal petitioner pleaded that the decision of his appeal "Ordered judgment affirmed" without opinion failed to answer his pleadings that the court below had jurisdiction over his cause, that the court below was in error in entering a judgment of dismissal *with prejudice* on the basis of the cited decision in *Oppenheimer v. Deutchman,* and that the court below had no power to enter any judgment against petitioner. (Record, Superior Court, petition for rehearing, page 1, line 19 to page 2, line 16.)

Furthermore, petitioner specifically claimed that the decree of the appellate court without opinion denied his claims that the statute of limitations of six years of the United States applies to his cause and that the respondent State Compensation Insurance Fund violated his rights under two prohibitions of the Fourteenth Amendment to the Constitution of the United States as follows:

> ". . . he had pleaded that the statute of limitations of six years of the United States applies to his cause which had accrued within six years because the Constitution of the State of California states that the Constitution of the United States is the supreme law of the land and because he had alleged that the defendants violated his rights under two prohibitions of the Fourteenth Amendment of the Constitution of the United States in that

5. the State Compensation Insurance Fund denied him the equal protection of the laws when it refused to appoint him solely on basis of his age in violation of the cited laws and the Constitution of the State after he had completed examinations for higher civil service positions, and

6. appropriated the property of the plaintiff, namely the difference between the earnings of the plaintiff as file clerk and the amount he would have earned in higher positions for which he had been found qualified, by compelling him to continue working in the file room or resigning, for public use without hearing and payment of compensation." (Record, Superior Court, petition, page 2, line 21 to page 3, line 6.)

Petitioner specifically claimed that the decision of the appellate court without opinion impliedly denied the protection of his rights under the cited provisions of the Constitution of the United States as follows:

"10. The affirmation of the judgment of the court below by the Superior Court must be considered a violative interpretation of the cited provisions of the laws and the Constitution of the State of California and of the laws and the Constitution of the United States because it impliedly denies their applicability to the cause of the plaintiff. The Supreme Court of the United States explained in *Thornhill v. State of Alabama,* 310 U. S. 88, 60 Sup. Ct. 736;" . . . First . . . "It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider v. State,* 309

U. S. 147, 161, 162, 60 S. Ct. 146, 150, 151, 84 L. Ed. 155." (Record, Superior Court, petition for rehearing, page 3, line 26 to page 4, line 6.)

On May 4, 1965 the Appellate Department of the Superior Court denied the petition for rehearing and the application for certification to the District Court of Appeal without opinion.

Petitioner specifically claimed in his petition for a writ of certiorari, filed on May 28, 1965 with the District Court of Appeal, Division One, in San Francisco that the decisions of the court below without opinions denied that the respondents violated his claimed rights guaranteed by the cited provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States as follows:

1. Right of the equal protection of the laws under Amendment XIV, Section 1: Petitioner specifically claimed that it was violated when the respondent State Compensation Insurance Fund refused to appoint petitioner Compensation Insurance Assistant because of his age and appointed people younger than he who had passed the test as he had.

2. Right that no person shall be deprived of property for public use without due process of law under Amendment XIV and Amendment V: Petitioner specifically claimed that it was violated when the respondent State Compensation Insurance Fund by not promoting him to higher positions for which he had been found qualified and the respondent State Personnel Board by demoting him in rank from 2 to 4

without explanation on the Accounting Technician II list for Fresno deprived him of property, namely the difference between his salary as Intermediate Clerk and the higher salaries of these positions for public use without hearing and compensation.

3. Right of due process of law under Amendment XIV and Amendment V: Petitioner specifically claimed that it was violated in that

(a) the respondent State Personnel Board, the Governor, the Attorney General, and the members of the State Legislature whom petitioner had petitioned for redress of his grievances held no public hearing concerning his charges that the respondents had violated his rights under California Government Codes 18932, 18951, 19050, 19700, 19680(c), 19681(c), 19058, 18901(b), and Article XXIV, Section 1 of the Constitution of the State of California;

(b) in that the court below without opinion denied his undisputed claim for damages made upon the ground that the respondent State Compensation Insurance Fund in violation of California Labor Codes 1050, 1052, and 1054 prevented him from securing steady employment during the first half of 1962 by giving detrimental information about him to prospective employers;

(c) in that the court below without opinion affirmed the judgment of dismissal *with prejudice* entered by the Municipal Court upon the false citation by the respondent State Compensation Insurance Fund in the cited case of *Oppenheimer v. Deutchman* against petitioner;

(d) in that the court below without opinion denied his claim that the statute of limitations of six years of the United States applies to his cause;

(e) in that the court below without opinion denied the undisputed claim of petitioner that the statement by the General Manager of the respondent State Compensation Insurance Fund to the Governor concerning his qualifications could not be reconciled with his good performance reports. (Record, District Court of Appeal, petition for a writ of certiorari, page 15 to page 20.)

The District Court of Appeal denied the petition for a writ of certiorari without opinion on June 2, 1965. (Record, District Court of Appeal, page 38, as numbered by the court.)

Petitioner claimed specifically in his petition for a hearing, filed on June 14, 1965 with the Supreme Court of the State of California that the decisions of the courts below supported by no reasons denied his rights under the cited regulations and decisions of the Supreme Court of the United States and federal courts. (Record, Supreme Court, petition for a hearing, page 6, lines 16-19.)

He pleaded that in his petition for a writ of certiorari with the District Court of Appeal he had "pleaded that the denial of his appeal and petition by the Appellate Department of the Superior Court, supported by no reasons, imply the denial of his rights under the cited Amendments of the Constitution of the United States, the Constitution and laws of the

State of California, and the decisions of the Supreme Court of the United States and federal courts" as follows (Record, Supreme Court, petition for a hearing, page 3, line 21 to page 4, line 4):

(1) The respondent State Compensation Insurance Fund by refusing to appoint petitioner Compensation Insurance Assistant because of his age and appointing people younger than petitioner who had passed the test as he had violated his right of the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

(2) The respondent State Compensation Insurance Fund by not appointing petitioner to higher positions for which he had been found qualified and the respondent State Personnel Board by demoting him in rank on an employment list without grounds deprived him of property, namely, the difference between the amount of his salary as Intermediate Clerk and the higher salaries of these positions for public use without hearing and compensation in violation of the cited provisions of the Fourteenth and Fifth Amendments of the Constitution of the United States.

(3) Petitioner alleged damages upon the ground that the respondent State Compensation Insurance Fund by giving detrimental information about him to his prospective employers in violation of Labor Codes, 1050, 1052, and 1054 deprived him of securing a permanent job during the first half of 1962.

(4) The Municipal Court had no power to enter a judgment of dismissal *with prejudice* against him

since he had informed the court on October 26, 1964 that he had filed a complaint against his former attorney for the return of his litigation papers and that he would amend his complaint as soon as he had received his papers. The judgment of dismissal *with prejudice* had been entered upon the false citation by the respondent State Compensation Insurance Fund in the cited case of *Oppenheimer v. Deutchman,* and the Municipal Court had given no reasons for entering this judgment even though it was in contradiction to the decision by the Superior Court in this case.

(5) "Petitioner pleaded that the statute of limitations of six years of the United States applies to his case because he had claimed violations of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States."

(6) "Petitioner pleaded that the statement by the General Manager of the State Compensation Insurance Fund to the Governor that it was not in the best interest of the Fund to promote or reassign him could not be reconciled with the good performance reports he had received, that it was supported by no reasons, and that no hearings were held in this matter; he was therefore denied due process of law." (Record, Supreme Court, petition for hearing, page 4, line 5 to page 6, line 13.)

The respondent State Compensation Insurance Fund wrote to the Supreme Court on June 23, 1965 that "defendants will not file an Answer . . . because it is our view that petitioner exhausted all available

remedies" when the Appellate Department of the Superior Court had denied his petition for rehearing or certification to the District Court of Appeal. (Record, Supreme Court, letter by the State Compensation Insurance Fund.)

On June 30, 1965 the Supreme Court decided without opinion: "Petition for hearing Denied." (Record, Supreme Court.)

REASONS FOR GRANTING THE WRIT

The decree of the Supreme Court of California should be reviewed because it denies summarily, without opinion, rights which petitioner claimed under the Fourteenth and Fifth Amendments to the Constitution of the United States and it is thus not in accord with applicable decisions of this Court.

1. Petitioner pleaded that the respondent State Compensation Insurance Fund refused to appoint him Compensation Insurance Assistant because of his age ("twenty more years on his back", as his Superintendent told him) and appointed people younger than he who had passed the test for this position as he had; that this refusal was in violation of California Government Codes 18932 and 19700 prohibiting specifically discrimination because of age in the State civil service, and of Government Codes 18951 and 19050 providing that every State employee "shall be permitted to advance according to merit and ability" and that "the appointing power in all cases" . . . "shall fill positions by appointment" . . . "in strict accordance

with this part" . . . "and not otherwise"; and that the respondent by refusing to promote him disregarded these Codes in an arbitrary and unjust manner and therefore violated the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall "deny to any person within its jurisdiction the equal protection of the laws". By denying his petition for a hearing without opinion, the Supreme Court of California denied the claim of petitioner that the respondent denied his Constitutional right of the equal protection of the laws.

The decree of the court below is not in accord with the applicable decision of this Court in *Yick Wo v. Hopkins, Sheriff,* 118 U. S. 356 (1885) involving discrimination on basis of race, in which the Court held on page 356:

> "An administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits violates the provisions of the Constitution of the United States, if it makes arbitrary and unjust discriminations, founded on difference of race, between persons otherwise in similar circumstances."

And on pages 373 and 374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution."

2. Petitioner had pleaded that the respondent State Compensation Insurance Fund refused to appoint him Compensation Insurance Assistant because of his age in violation of State Government Codes 18932, 19700, 18951 and 19050; that the respondent coerced him to waive employment rights for the position of Compensation Insurance Technician in violation of State Government Code 19681(c); that his rights under State Government Codes 19050, 19058, and 18901(b) were violated when his name was on two Accounting Technician II civil service lists and the respondent appointed people Accounting Technician II whose names were on no such lists; that his rights under Government Code 19680(c) were violated when the respondent gave secret instructions to qualification appraisal panels not to let him pass interviews because of his age; that the respondent State Personnel Board demoted him in rank from 2 to 4 without explanation on the Fresno Accounting Technician II list in violation of Article XXIV, Section 6(a) of the Constitution of the State of California; that he petitioned in vain the State Personnel Board, the Governor, the Attorney General and members of the State Legislature for redress of his grievances; and that no hearing was held. He pleaded that the respondents by not appointing him to the higher positions for which he had been found qualified deprived him of property, namely, the difference between the amount of his salary as Intermediate Clerk and the higher salaries of these positions for public use without hearing and compensation in violation of the cited provisions of the Fourteenth

and Fifth Amendments to the Constitution of the United States. By denying his petition for a hearing, without opinion, the Supreme Court of California denied the claim of petitioner that the respondents deprived him of property without due process of law in violation of the cited provisions of the Fourteenth and Fifth Amendments to the Constitution of the United States.

This decision of the Supreme Court of the State of California is not in accord with the applicable decision of this Court in *United States v. Lynah,* 188 U. S. 445, 464, 465 (1903), in which the Court held:

> "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. . . . The government may take personal or real property whenever its necessities or the exigencies of the occasion demand . . . but the Constitution in the Fifth Amendment guarantees . . . that when this . . . right of appropriation . . . is exercised it shall be attended by compensation." (Cited in United States District Court for the District of Oregon, Civil No. 61-349, Memorandum of Decision, *Dillon v. United States* (June 22, 1964).)

3. Petitioner had pleaded that the statute of limitations of six years of the United States applies to his cause since Article I, Section 3 of the Constitution of the State of California states that ". . . the Constitution of the United States is the supreme law of the land" and since he had claimed violations of his

rights under the cited provisions of the Fourteenth and Fifth Amendments to the Constitution of the United States. In denying his petition for a hearing without opinion, the Supreme Court of the State of California denied his claim that the statute of limitation of six years of the United States applies to his cause.

This decision of the Supreme Court of the State of California is not in accord with the applicable decision of this Court in *Kendall v. United States,* 107 U. S. 123, 125, in which this Court held:

> "The express words of the statute leave no room for contention. *Every* claim—except those specifically enumerated—is forever barred unless asserted within six years from the time it first accrued."

4. Petitioner had pleaded that the statement by the General Manager of the respondent State Compensation Insurance Fund to the Governor that it was not in the best interest of the Fund to promote or reassign him could not be reconciled with the good performance reports he had received (quoted in full in appellant's answering brief, Superior Court, page 7, line 28 to page 8, line 16), that the "best interest" was not defined, that no hearings were held, that the statement hurt his good name, that due to similar statements to his prospective employers he could not find steady employment from February to June 1962 after his graduation from college, and that the respondents acted against him in a malicious, and oppressive manner because he was the first employee of the respond-

ent State Compensation Insurance Fund who had appealed his disqualifications in interviews for higher positions and who had filed grievances. By denying his petition for a hearing without opinion, the Supreme Court of the State of California denied petitioner's claim that he was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The decree of the Supreme Court of California denying the petition of petitioner for a hearing without opinion is not in accord with the applicable decision of this Court in *Thornhill v. Alabama,* 310 U. S. 88, 96, in which the Court held:

> " 'Conviction upon a charge not made would be sheer denial of due process of law.' *De Jonge v. Oregon,* 299 U. S. 353, 362; *Stromberg v. California,* 283 U. S. 359, 367-368."

The Appellate Department of the Superior Court decided without opinion "that there is no error in the record prejudicial to the appellant" even though the petitioner had specifically claimed denial of his rights under the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of California denied the petition for a hearing without opinion after the respondent State Compensation Insurance Fund had written to this Court that the case of petitioner should not be kept alive after final decision by the Appellate Department of the Superior Court.

The decision of the Supreme Court of the State of California denying petitioner a hearing, without

opinion, is not in accord with the following applicable decisions of this Court:

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis v. Wechsler, supra,* at 24. Cf. *Matty v. Grasselli Chemical Co.,* 303 U. S. 197."
>
> *Brown v. Western R. of Alabama,* 338 U. S. 294, 298-299.

> ". . . The due process of law clause in the Fourteenth Amendment . . . does require . . . that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'."
>
> *Herbert v. Louisiana,* 272 U. S. 312, 316-317.

> "3. This Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it;"
>
> *Fiske v. Kansas,* 274 U. S. 380.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
September 13, 1965.

GERHARD BRASCH,
Petitioner in propria persona.

(Appendix Follows)

Appendix

CONSTITUTION OF THE UNITED STATES

Amendment V. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV. Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF CALIFORNIA

Article I. United States Constitution Supreme Law. Sec. 3. "The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Right to Assemble and to Petition. Sec. 10. "The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

Article V. Executive Department. Responsible for Execution of Laws. Sec. 7. "He shall see that the laws are faithfully executed."

Law Enforcement Powers of Attorney General. Sec. 21. "Subject to the powers and duties of the Governor vested in him by Article V of the Constitution, the Attorney General shall be the chief law

officer of the State and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the State. . . ."

Article XXIV. State Civil Service. Appointments and Promotions in State Civil Service. Section 1. "Permanent appointments and promotion in the state civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination."

Temporary Appointments. Sec. 6 (a). "No temporary appointment of a person to any position shall be made unless there is no employment list from which such position can be filled."

CALIFORNIA GOVERNMENT CODE

Government Code 18901 (b). "When a list of eligibles becomes exhausted for temporary or permanent employment before the legal expiration of the list, and a new list of eligibles for the same class is created by examination to supply the demands of the service, such new list shall become a part of the list of eligibles to be certified to the positions covered by the list. Those holding places on the prior list shall be given preference for appointment until such time as the prior list may automatically expire or all names are removed therefrom by action of the board. When the prior list has expired by reasons of limitation of time, or the names have been removed therefrom by

order of the board, then certification shall be made solely from the latter list."

* Government Code 18932. "The board shall not establish any minimum or maximum age limits for any civil service examination, except in the case of positions involving public health or safety or having the powers and duties of a peace officer, as defined in Section 817 of the Penal Code, and for trainee positions the board may establish minimum and maximum age limits. The board shall waive such age limits for persons competing in examinations on a promotional basis. The board may refuse to examine or after examination to declare or certify as eligible any one who is within one year of the compulsory retirement age provided by law for the class of positions to which the person seeks appointment.

Any person possessing all the minimum qualifications for any state position is eligible, regardless of his age, to take any civil service examination given for that position, except as provided in this section. (Amended by Stats. 1955, Ch. 798.)

* Exceptions to Section 18932 are 2256 of the Vehicle Code, 854 of the Fish and Game Code, and 15005 of the Government Code which read as follows:

2256. Notwithstanding Section 18932 of the Government Code, the minimum age limit for any examination for the position of State Traffic Officer of the California Highway Patrol shall be 21 years, and the maximum age limit shall be 31 years. (Amended by Stats. 1959, Ch. 3.)

854. Notwithstanding Section 18932 of the Government Code, the minimum age limit for any examination for the position of Fish and Game Warden of the California Department of Fish and Game shall be 21 years, and the maximum age limit shall be 40 years. The age limits set herein shall not affect civil service eligible lists in effect Sept. 7, 1955, nor apply to departmental employees in the first examination held subsequent to Sept. 7, 1955. (Amended by Stats. 1957, Ch. 456.)

15005. Notwithstanding Section 18932 of the Government Code, the minimum age limit for any examination for the position of special agent shall be 21 years, and the maximum age limit shall be 40 years. The age limits set forth herein shall not affect civil service eligible lists in effect at the time this section becomes effective. (Added by Stats. 1963, Ch. 2031.)"

Government Code 18951. "The board and each state agency and employee shall encourage economy and efficiency in and devotion to state service by encouraging promotional advancement of employees showing willingness and ability to perform efficiently services assigned them, and every person in state service shall be permitted to advance according to merit and ability."

Government Code 18952. "Any employee who feels aggrieved at any action taken by any superior or fellow employee in discouraging or in any manner hindering or preventing him from taking any examination or any other action which he deems beneficial to himself may appeal to the board in writing. Any

such appeal or communication in connection therewith is confidential and shall not be disclosed without the consent of the employee taking such appeal. Immediately after receiving such appeal the board shall investigate and shall take such action as it deems necessary."

Government Code 19050. "The appointing power in all cases not excepted or exempted by virtue of the provisions of Article XXIV of the Constitution shall fill positions by appointment, including cases of transfers, reinstatements, promotions and demotions, in strict accordance with this part and the rules prescribed from time to time hereunder, and not otherwise. Except as provided in this part, appointments to vacant positions shall be made from employment lists."

Government Code 19058. "When there is no empoyment list from which a position may be filled, the appointing power with the consent of the board may fill such position by temporary appointment. Such temporary appointment shall continue only until eligibles are available from an appropriate employment list and not to exceed the period prescribed by Section 6 of Article XXIV of the Constitution; provided, that within the limits of the period prescribed by the Constitution any temporary appointment to a position the duration of which is not to exceed the probationary period for the class may, in the discretion of the appointing power and with the approval of the board be continued for the life of such position. An appropriate employment list shall be

established for each class to which temporary appointment is made before the expiration of such appointment. (Amended by Stats. 1949, Ch. 221.)"

Government Code 19680. "It is unlawful for any person:

(c) Wilfully to furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person examined, certified or to be examined or certified under this part or board rule."

Government Code 19681. "It is unlawful for any person:

(c) To use any unfair means to cause or attempt to cause any eligible to waive any rights obtained under this part. (Amended by Stats. 1953, Ch. 431.)"

Government Code 19700. "The board, its executive officer, or any appointing power shall not adopt any rule, either written or unwritten, prohibiting the employment of any person in any state position who is otherwise qualified therefor, solely because of his age, except as provided in Section 18932.

This section does not authorize the employment of any person in any state position who has reached the retirement age for that position. (Amended by Stats. 1945, Ch. 62.)"

CALIFORNIA LABOR CODE

Labor Code 1050. "Any person, or agent, or officer thereof, who, after having discharged an employee from the service of such person or after having paid off an employee voluntarily leaving such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."

Labor Code 1052. "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of Sections 1050 and 1051, or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor."

Labor Code 1054. "In addition to and apart from the criminal penalty provided any person or agent or officer thereof, who violates any provision of Sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article."

COURT DECISIONS

The following are citations of court decisions:

"(15) Dismissal—Order or Judgment.—Judgment dismissing action for failure of plaintiff to amend complaint within time allowed by law after demurrer thereto was sustained, while proper, should not be 'with prejudice'."

"(15) Although the court properly dismissed the action, it should not have done it *with prejudice (Mattoson v. Klamp* (1929), 100 Cal. App. 64, 65 (279 P. 669))."

"The judgment must be modified by striking therefrom the words 'with prejudice'."

Oppenheimer v. Deutchman, 132 C.A. Supp. 875, 876-877, 880, 281 P. 2d 650.

The phrase "not in the Fund's best interest" in the determination by the General Manager of the respondent State Compensation Insurance Fund, as communicated to the Governor, has no ascertainable meaning, either inherent or historical.

"(21a) We are of the opinion that on the face of the ordinance the indefinite standards which it enunciates provide a mechanism for the deprival of constitutional rights, not only on the basis of the guaranties applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity."

In re Porterfield, 28 C.2d 91, 111; 168 P.2d 706.

Order Due
July 2, 1965

In the Supreme Court of the State of California

In Bank

Brasch

v.

Appellate Department of the Superior Court of the City and County of San Francisco

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ORDER DENYING HEARING

After Judgment by District Court of Appeal
1st District, Division 1, Civil No. 22864

Petition for hearing DENIED.

Traynor
Chief Justice

Filed June 30, 1965,
William I. Sullivan, Clerk,
By Bishel, S. F. Deputy.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 12th day of July, A.D. 1965

(Seal)

William I. Sullivan, Clerk,
By R. C. Matteoli, Deputy Clerk.